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Supreme Court of the United States

OCTOBER TERM, 1959

No. 882

MAX WINZELBERG, an Individual,
Petitioner,

v.

R. K. BAKING CORP., and BAKERY & PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents,

and

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MORRIS D. FORKOSCH
375 Pearl Street
Brooklyn 1, N. Y.
Counsel for Petitioner

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Max Winzelberg, an individual, hereafter called Petitioner, is the complainant in the proceedings instituted originally herein by the National Labor Relations Board, hereafter called Labor Board or Board. Petitioner respectfully prays that a writ of certiorari issue to review so much of the decree of the United States Court of Appeals for the Second Circuit, entered January 27, 1960, as (1) grants enforcement only in part to the Board's order for back pay to the extent that said Court of Appeals awards or enforces back pay of $696.36 and no more and reduces or modifies or both the back pay award of the Board to Petitioner in the sum of $12,438.11; (2) refuses to enforce the entirety of the back pay

award of the Board to Petitioner in the sum of $12,438.11; and (3) refuses to enforce the provision of the said order of the Board instating Petitioner to a permanent position.

Citations to Opinions Below

The original opinion, decision and order of the Board, dated March 3, 1953, together with the single Intermediate Report dated November 13, 1952, are found reported in 103 N. L. R. B. 227.

The first opinion of the Court of Appeals for the Second Circuit, on the Labor Board's petition for enforcement of the aforesaid order, is dated February 15, 1954, and is found reported in 210 F. 2d 772. It is not found in the Board's Appendix herein and is therefore reproduced in its materiality as an appendix to this petition. The decree thereon, subsequent to the Board's petition for rehearing which resulted in a modification by the Court of its said decision, is dated September 10, 1954, and is printed in the "Supplemental Appendix to Petitioner's Brief" in the Court of Appeals (hereinafter cited as "Board's Appendix" or B. A.), at p. 84.

The second supplemental opinion, decision and order of the Labor Board, dated May 6, 1958, together with the Supplemental Intermediate Report dated April 11, 1955, and the Second Supplemental Intermediate Report dated May 31, 1957, are found reported in 120 N. L. R. B. 772 and are printed also in B. A. at pp. 4, 60, and 23 respectively.

The second opinion of the Court of Appeals for the Second Circuit, on the Board's second petition for enforcement of its aforesaid second supplemental order, is dated December 24, 1959, and is found reported in 273 F. 2d 407, and is printed also in B. A. at p. 296; the decree thereon is at B. A., p. 305, and is reproduced herein as an appendix to this petition.

Jurisdiction

The date of the decree sought to be reviewed herein and the time of its entry is January 27, 1960.

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. §1254(1), as permitted by and in 49 Stat. 453, 29 U. S. C. §160(e), as amended.

Questions Presented

1. In general, can or may the Court of Appeals, on the facts in this case, refuse to enforce an order of the Labor Board, or any portion thereof, based upon substantial evidence, to which two Trial Examiners and four plus three Labor Board Members have unequivocally assented, and which order, in all its parts, in the opinion of said persons, is necessary and required in order not only to wipe out the conceded unfair labor practices engaged in herein by the two Respondents but also to effectuate the public purposes of the National Labor Relations Act, as amended?

2. In particular, can or may the Court of Appeals, on the facts in this case, refuse to enforce in full, or else modify and enforce only in part as so modified, so much of an order of the Labor Board, based upon substantial evidence, to which two Trial Examiners

and four plus three Labor Board Members have unequivocally assented, which awards net back pay to the Petitioner in the sum of $12,438.11 for the damages and losses suffered by him because of the conceded discrimination practiced against him by the two Respondents and which order also effectuates the public purposes of the Act?

3. In particular, can or may the Court of Appeals, on the facts in this case, refuse to enforce in full, or else modify and eliminate and refuse to enforce so much of an order of the Labor Board, based upon substantial evidence, to which two Trial Examiners and four plus three Labor Board Members have unequivocally assented, which directs instatement to a permanent job of Petitioner by Respondent R. K. Baking Corp. and requires Respondent Teamsters Local 802 to notify said R. K. that it does not object to such instatement and which order also effectuates the public purposes of the Act?

Statutes Involved

The discrimination being conceded herein, as the Court of Appeals has affirmed the Board's finding thereon, the only statutory provision actually involved relates to the power of the Board to order instatement and back pay to effectuate the policies of the Act, as amended, 49 Stat. 453, 29 U. S. C. §160(c) and (e), the pertinent texts of which follow:

§160(c):

". . . If upon a preponderance of the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . ."

§160(e):

". . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ."

Statement

A. Basis for Jurisdiction

The basis for federal jurisdiction in the court of first instance is the review by the Court of Appeals for the Second Circuit on a petition for enforcement by the Labor Board, which proceeded under 49 Stat. 453, 29 U. S. C. §160(e), the unfair labor practices having occurred within that Circuit and the Respondents residing or transacting business therein.

B. Material Facts

Max Winzelberg, the Petitioner, during the periods involved herein, was a salesman on a retail bakery route. He filed charges with the Board's Second Region on December 27, 1950, against Gottfried Baking Co., Inc., his former employer, alleging a violation of the amended National Labor Relations Act, §8(a)(3) and (1) [29 U. S. C. §158(a)(3) and (1)]. This received Case No. 2-CA-1741.

Thereafter Petitioner filed separate charges on February 16, 1951, against Teamsters Local 802, one of Respondents herein, alleging a violation of §8(b)(1)(A) and (2). This received Case No. 2-CB-578.

Under date of July 26, 1951, amended charges in both of the above were filed. In addition, Petitioner filed separate charges against R. K. Baking Corp., alleging violations of §8(a)(3) and (1), as well as of §8(a)(4). This received Case No. 2-CA-2067.

The complaint against each employer, i. e., Gottfried and R. K., alleged that each had discriminated by executing and maintaining an illegal union-security agreement with Teamsters Local 802, and also by refusing to hire Petitioner because he was not a member of the Teamsters in good standing. Local 802 was charged with causing each employer thus to discriminate against Petitioner. Additionally, R. K. was alleged to have violated §8(a)(4) by offering Petitioner employment if he withdrew the charges against the Teamsters (B. A., pp. 23-24).

On December 12, 1951, all three cases were consolidated for trial and, on various dates between February 4, 1952, and May 7, 1952, hearings were conducted before Trial Examiner Scharnikow who, on November 13, 1952, issued his single intermediate report and recommended decision. On March 3, 1953, Chairman Herzog and Members Styles and Peterson adopted all material findings, conclusions, and orders. (See 103 N. L. R. B. 227, summarized and cited hereinafter.) All charges against Gottfried eventually became unimportant and are not further considered (it was found to have committed an unfair labor practice), but only those against Teamsters alleging it had caused Gottfried to discriminate against Petitioner were dismissed; only the §8(a)(4) charges against R. K. were likewise dismissed (B. A., pp. 24-25).

The Labor Board, *inter alia*, upheld the Trial Examiner's findings, etc., of the illegality of the union-security clauses and the discriminatory rejection of Petitioner's application for a job by R. K.; it also adopted the Examiner's recommendations directing R. K. to offer Petitioner immediate employment as a route salesman, and directed both R. K. and Teamsters jointly and severally to make Petitioner whole for any loss of pay or earnings suffered by him because of the discrimination (B. A., pp. 28-29).

On September 4, 1953, the Board, for the first time, petitioned the Second Circuit for enforcement. On February 15, 1954, the Court upheld all findings of discrimination but rejected the remedy of instatement of Petitioner by R. K., with back pay against it and Teamsters, and the necessity of said R. K. to

establish another sales route for Petitioner. The reasons of the Court were that "such an offer of *permanent* employment (requiring, as it would, the establishment of another sales route) was 'too drastic a remedy,' and the loss of earnings beyond the clearly contemplated period of Winzelberg's temporary replacement of Greenhoots, the sick employee, would be 'too conjectural to be computed.' . . ." (B. A., pp. 29-30).

On March 10, 1954, the Board's General Counsel petitioned for a rehearing, and on May 17, 1954, the Court granted the petition and modified its decision. The decree on such modification was entered September 10, 1954. The modification consisted in the Court's withdrawal of that portion of its original decision of February 15, 1954, just discussed and quoted in the preceding paragraph's last sentence, and now remanding the proceedings to the Board (B. A., pp. 97-98). The fourth paragraph of the decree required

> "that the case be remanded to the Board for the purpose of hearing and determination of the specific obligation of Respondents R. K. and the Union under that portion of the Board's order of March 3, 1953, which [1] requires R. K. to offer Max Winzelberg immediate employment as route salesman, and [2] requires that Respondents R. K. and the Union jointly and severally make Winzelberg whole for the loss of earnings incurred because of the discrimination practiced against him" (B. A., p. 85).

Between December 21, 1954, and February 9, 1955, hearings pursuant to the said paragraph 4's two re-

manding requirements on instatement and back pay were held before Trial Examiner Buchanan. Under date of April 11, 1955, said Examiner rendered a Supplemental Intermediate Report (B. A., pp. 60-84) which, on the said two remanded issues, found for Petitioner (B. A., pp. 83-84).

During the course of the hearings before Examiner Buchanan, Teamsters Local 802 and R. K. both sought to introduce newly-found evidence allegedly disclosing fraud by Petitioner and one Charles Gottfried, and also a lack of good faith by Petitioner in his application for employment (see B. A., p. 33); this was rejected by the Examiner because of the limitations imposed by the scope of the remand, and the Board upheld this rejection. However, after the issuance of the said Supplemental Intermediate Report of April 11, 1955, the Board, under date of October 3, 1955, now petitioned the Court to amend the said remand order to enable the receipt of evidence as to all the circumstances bearing upon the aforesaid new issues. Respondents R. K. and Teamsters were not only in favor of this motion to enlarge the remand order but each also moved for additional and further enlargement. On November 30, 1955, the Second Circuit disposed of all three requests by deciding that the "Motion of the Board [is] granted, all other motions denied" (B. A., pp. 86-97, quoted at p. 100). The Board, on April 10, 1956, ordered the record to be reopened for a further hearing on the said *bona fides* and on the alleged fraud (B. A., pp. 97-101).

Between July 23, 1956, and March 27, 1957, hearings on these new issues were held before Examiner Scharnikow. (The reason for this stretch of time

is that a proposed settlement among the parties was rejected by the Board. B. A., p. 35, fn. 9.) Under date of May 31, 1957, the Examiner issued a Second Supplemental Intermediate Report (B. A., pp. 23-60) and urged, in effect, complete rejection of the claims by R. K. and Teamsters, and recommended "that the Board confirm in all respects the terms of the orders issued by it on March 3, 1953, against the Respondents R. K." and Teamsters (B. A., p. 60).

One year after the Second Supplemental Intermediate Report was issued, and on May 6, 1958, Chairman Leedom and Members Rodgers, Bean and Jenkins issued their Supplemental Decision and Order (B. A., pp. 4-19, reported in 120 N. L. R. B. 772). This was now based not only upon the entire original record in the case but also upon the Buchanan and Scharnikow supplemental intermediate reports, the exceptions of all parties thereto, and the briefs. The Board now "hereby adopts the findings, conclusions, and recommendations of Trial Examiners Scharnikow and Buchanan, with the following modifications" (B. A., p. 7).

The Board's modifications on jurisdiction (B. A., pp. 7-8) and fraud (B. A., pp. 8-10) are not material to the consideration of the instant petition for certiorari and are not otherwise presented.

On the question of Petitioner's right to employment and to back pay, the Board agreed "with Trial Examiner Buchanan that as of the close of the hearing before him Winzelberg was entitled to employment in a job as a route salesman. We further find that Winzelberg is entitled to net back pay amounting

to $12,438.11. . . . In so finding, we rely on the findings and reasoning of Trial Examiner Buchanan with the following exceptions and modifications" (not material herein) (B. A., pp. 11-12).

Under date of March 20, 1959, the Board again petitioned the Second Circuit for enforcement of its aforesaid Supplemental Decision and Order (B. A., pp. 280-283).

Under date of December 24, 1959, the said Court rendered its decision enforcing in part and denying enforcement in part (B. A., pp. 296-304). The Court sustained the Board on the subsidiary issues of Petitioner's *bona fides* as to his application for employment, and on the question of the alleged fraud involving Petitioner and said Charles Gottfried, but as to the important and material questions of instatement and the amount of back pay refused to enforce the first portion, i. e., instatement, and reduced the Board's award of $12,438.11 in back pay to $696.36, and granted enforcement only as to said reduced amount.

The Court's decree on such opinion is dated and filed January 27, 1960 (B. A., pp. 305-307), and is reproduced as an appendix hereto, and the certification of the record and proceedings below is at B. A., p. 308.

It is from the said decree of January 27, 1960, and as based upon the said decision and opinion of December 24, 1959, that this instant petition for certiorari is taken.

Reasons for Granting the Writ and Arguments Thereon

A. In General

The reasons generally relied on for the allowance of the writ herein, and as more fully particularized below, are that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in Labor Board effectuating orders as to call for an exercise of this Supreme Court's power of supervision; that the Court of Appeals has ignored the usual dichotomy between administrative effectuation of statutory policies consonant with its delegated powers and the judiciary's power of review; that the Court of Appeals has erred grievously in not following the statutory direction making Labor Board findings, supported by substantial evidence on the whole record, conclusive, and with these findings the orders based upon and logically inferred therefrom necessary to effectuate the policies of the Act; that the Court of Appeals arbitrarily and capriciously ignored the findings, conclusions, recommendations, directives, and orders of three Trial Examiner intermediate reports, and seven different and separate Members of the Labor Board, all of whom unanimously and continuously voted for instatement of and $12,438.11 back pay to Petitioner; that the Court of Appeals has failed to follow its own original determination and opinion as the law of the case and thereby misled and lulled the Labor Board into proceeding upon a basis other than eventually was utilized by the said Court in refusing to enforce the Board's order; that under the circumstances herein the superintending power of this Supreme Court to cure inequities in the federal judicial system should be here exercised.

B. Principles, Facts, and Law Involved

It is respectfully urged that not alone is the resolution of the credibility of the witnesses for the trial examiners who saw the witnesses under cross-examination, *N. L. R. B.* v. *Steel, Metals, Alloys & Hardware Fabricators and Warehousemen, Local 810, Teamsters Union* (2d Cir. 1960), 274 F. 2d 688, citing and following *Universal Camera Corp.* v. *N. L. R. B.* (1951), 340 U. S. 474, but in the instant case the Second Circuit has adopted all findings of fact as to §8(a)(1) and (3) and §8(b)(1)(A) and (2) violations respectively by Respondents R. K. and Teamsters, *N. L. R. B.* v. *Gottfried Baking Co., et al.* (2d Cir. 1954), 210 F. 2d 772, as reaffirmed in the 1960 opinion below, B. A., pp. 297-298.

This petition for certiorari therefore turns solely upon the two remedies proposed by the Board to eradicate these violations of the Act so as "to advance the public interest," *N. L. R. B.* v. *Fant Milling Co.* (1959), 360 U. S. 301, 307-308, and the "private" remedies, *i. e.*, instatement and back pay herein, are utilized to effectuate these statutory purposes. (See, *e. g.*, the history and background of the private treble-damage remedy permitted under the Sherman Anti-trust Act. Forkosch, *Antitrust and the Consumer* [1956].)

In 1954 the Second Circuit initially felt that the instatement and back pay remedies should be rejected because "such an offer of *permanent* employment (requiring as it would the establishment of another sales route) was 'too drastic a remedy,' and the loss of earnings beyond the clearly contemplated period

of Winzelzerg's [Petitioner's] temporary replacement of Greenboots, the sick employee, would be 'too conjectural to be computed.' . . . ." (as paraphrased by Examiner, B. A., pp. 29-30). This initial rejection was not made permanent, however, for on May 15, 1956, the Second Circuit, on the Board's motion, "amended its opinion by withdrawing its partial rejection of the Board's remedy and stated it would 'suspend passing upon' the remedy and would remand the case for hearing on that issue. . . ." (B. A., p. 10, fn. 7, Board's Supplemental Decision).

For purposes of clearness in later discussing and clarity of understanding, it is repeated here that the characterization by the Court of the Board's order as "drastic" involved, as the Examiner stated in the preceding paragraph, "the establishment of another sales route." It is not instatement to an existing and open position which is "drastic," but the creation of a job by R. K. which is initially felt to be too harsh.

However, several facts and factors now enter to disclose that this 1954 suspended rejection effected a judicial mind-set in the Second Circuit, and that its 1960 opinion (on the decree of which certiorari is sought herein) erroneously overlooked, or did not give any or sufficient weight to, the newly-introduced evidence on these two remedies, especially the instatement question.

First: After the 1954 opinion the Second Circuit remanded the matter to the Labor Board. That remand was "for the purpose of hearing and determination of the specific obligations of" (B. A., p. 85) both Respondents on the two remedies of instatement and back pay. In other words, the Second

Circuit desired specific evidence to disclose the necessity and availability of these remedies. But after this remand the Board petitioned for an enlargement thereof (B. A., pp. 86-88) and R. K. and Teamsters not alone joined in but asked for a still further enlargement. The three requests for enlargement appear as follows:

By Board (B. A. 86-88)	By R. K. (B. A. 89)	By Teamsters (B. A. 93)
1. *Bona fides* of Petitioner's application for employment	1. Same	1. Same
2. Fraud by Petitioner and one Charles Gottfried	2. Implied	2. Implied
	3. Petitioner's qualifications for the job	
	4. "The effect of Winzelberg's lack of good faith and qualifications as related to a back-pay award for a period of more than four years."	
		5. "[A]ll circumstances relating to the . . . accepting of employment" by Petitioner
		6. "[A]ll circumstances relating to the . . . existence and availability of a job. . . ."

Both R. K. and Teamsters thus sought, but were denied, enlargement of the remand beyond that requested by the Board. ("Motion of the Board [is] granted, all other motions denied." B. A., p. 100.) This order became the law of the case, and the Second Circuit thus announced, impliedly, that claims 3, 4, 5, and 6 of the above tabulation were resolved in favor of the Board (and also the Petitioner herein). But the Board nevertheless went beyond its requirements, and the Second Circuit never even followed through on its own order!

For example, relying upon the Second Circuit's denial of R. K.'s and Teamsters' motions to further enlarge, and sticking to the terms of the remand as slightly enlarged, the Board and its Examiners could well have ignored the necessity, assuming it existed, of evidence on these rejected items. But the record contains credible and credited evidence "that R. K. had a vacancy owing to route driver Greenhoot's illness and that R. K.'s president told Winzelberg that he was qualified therefor. . . . As to Winzelberg's qualifications to fill in for vacationing route salesmen and to perform the duties of a permanent route salesman . . . Winzelberg would have been at least as well qualified as Greenberg to fill the jobs held by Greenberg. . . ." (B. A., p. 11, fn. 8).

To illustrate the Second Circuit's capriciousness, its 1960 opinion, the basis for this petition for certiorari, contends that instatement and back pay are once again "drastic remedies" (B. A., p. 301). Agreed. But there are two answers to this.

(a) Legal principles: From the first day of the Act's enforcement these "drastic" remedies have been

the usual ones in situations of this sort. Since the Board was given power "to direct such action as will dissipate the unwholesome effect of violations of the Act," *Franks Bros. Co.* v. *N. L. R. B.* (1944), 321 U. S. 702; *Republic Steel Corp.* v. *N. L. R. B.* (1940), 311 U. S. 7, and since it is an unfair labor practice to refuse employment under the instant facts, *e. g., Phelps Dodge Corp.* v. *N. L. R. B.* (1941), 313 U. S. 177, instatement is not alone permitted but as collateral benefits, there is also permitted rights to seniority. *Corning Glass Works* v. *N. L. R. B.* (2d Cir. 1941), 129 F. 2d 967; *N. L. R. B.* v. *Skinner & Kennedy Stationery Co.* (8th Cir. 1940), 113 F. 2d 667. However, and regardless of the economic situation which is, in effect, self-imposed by violators, it is not the function of a Court of Appeals to remake or reject orders, however drastic, where these are supported by the facts disclosed, the factors involved, the Board's judgment thereon, the Board's expertise based upon its accumulated wisdom, and the public interests and purposes of the Act.

It is conceded that Congress has not vested an unlimited power or discretion in this Board to devise measures to effectuate the policies of the Act. *Southern S. S. Co.* v. *N. L. R. B.* (1942), 316 U. S. 31; *Republic Steel Corp.* v. *N. L. R. B., supra,* at p. 11. But neither has Congress created a super-Board in the review powers granted to the Courts of Appeals. The power of the judiciary, as discussed herein, is circumscribed by the substantial evidence rule on the whole record, which makes Board findings of fact thereon conclusive; these findings must be present so as to provide a base upon which the scope and terms

of Board effectuating orders can rest; and so long as the Board has not "patently traveled outside the orbit of its authority," *N. L. R. B.* v. *Cheney California Lumber Co.* (1940), 327 U. S. 385, 388, then its expertise and informed judgment as to these orders should be judicially accepted and followed.

The Labor Board has "ample discretion in adapting remedy to violation," *ibid.*, at p. 388, for "in the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review." *Phelps Dodge Corp.* v. *N. L. R. B.* (1941), 313 U. S. 177, 194. See also *N. L. R. B.* v. *Seven-Up Bottling Co. of Miami, Inc.* (1953), 344 U. S. 344, 348, 348-349.

The Board may thus exercise a broad range of affirmative powers in determining what is required and best suited in a particular situation to eliminate the employer or union conduct, *Franks Bros.* v. *N. L. R. B.* (1944), 321 U. S. 702, the only judicial limitation now imposed being that the courts are "to see whether on the evidence they [the orders] go 'so beyond the authority of the Board as to require modification as a matter of law before enforcement." *May Department Stores Co.* v. *N. L. R. B.* (1945), 326 U. S. 376, 392.

The characterization by the Second Circuit of the Board's instatement and back pay orders as "drastic"

harks back to the attempted distinction between remedial and punitive orders; this Court answered this by asking the lower courts "to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act." *N. L. R. B.* v. *Seven-Up Bottling Co. of Miami, Inc., supra,* p. 348. And the Labor Board has long followed the principle of narrowly cutting and tailoring its order, to fit and strike at particular violations uncovered by actual proof in the record, see, *e. g., Bitner Fuel Co.* (1950), 92 N. L. R. B. 953; *Electric Auto-Lite Co.* (1951), 92 N. L. R. B. 1073, for this Supreme Court will not permit an enforcement decree to extend farther than is necessary to prevent the unfair labor practice. *N. L. R. B.* v. *Crompton-Highland Mills, Inc.* (1949), 337 U. S. 217, 226.

(b) The facts herein: We have heretofore particularized the initial "drastic" characterization of the Board's instatement order as related, then, to the required establishment of another sales route by Respondent R. K. On the remand, however, testimony was introduced on this question. These facts are discussed in greater detail immediately below, but now it suffices to quote from the Board's Supplemental Decision, B. A., p. 11, fn. 8, last paragraph:

> "In its brief to the Board, R. K. contends that should the Board, as recommended by Trial Examiner Scharnikow, reaffirm the remedy contained in its original Order herein, the Court's 'suspended' characterization (see fn. 7 above) of that remedy as 'too drastic' and 'too conjectural' would still be applicable. However, unlike the

situation at the time of the Court's initial opinion, the record now contains concrete evidence as to the incidence of turnover among R. K.'s route salesmen, and as to R. K.'s seniority practices, so that these factors bearing on Winzelberg's opportunities for advancement to a route salesman's job, absent discrimination, are no longer matters of conjecture."

Second: If Petitioner's qualifications for the job are not denied, and a vacancy then existed with R. K., and the Board's findings of fact throughout are not challenged, then how can the Court below deny the Board's instatement requirement? And especially when R. K. no longer is required to create a new position? The answer seemingly is that the Second Circuit indulged in a line of reasoning which is not alone fallacious logically but also factually.

The Second Circuit's reasoning is found at B. A., pp. 300-304, the second half of the Court's opinion. These are the factual bases for the different lines of reasoning between the Labor Board and the Court of Appeals:

a) February 7, 1951-March 10, 1951 (the first period involved). Since an unfair labor practice in refusing to hire occurred on February 7th, both the Board and the Circuit Court agree that Petitioner is entitled to instatement from then to March 10th. This period involved a temporary employment as a replacement for a sick driver. The sick driver returned so that, reasoned both the Board and the Court, Petitioner's temporary job would have ceased as of then.

b) June 18, 1951-September 8, 1951 (the second period involved). The date of June 18th is important to the understanding of the case. The basis for the Board's including this period in an award of back pay to Petitioner is simple: during the summer there are vacation relief men employed who substitute for the regular and permanently employed drivers who take off. These vacation relief men are taken on on a basis of seniority. The Examiner (B. A., pp. 75-76) and the Board (B. A., p. 11, fn. 8) both discussed this question and concluded that if Petitioner were instated for the first period (the Second Circuit agreed to this instatement period) then he should also be given credit for seniority which could have been so earned (the Second Circuit, as heretofore noted, concedes the giving of increased seniority upon reinstatement, *Corning Glass Works* v. *N. L. R. B.*, *supra*, during this instatement period; Petitioner having this seniority then, reasoned the Examiner and the Board, he should have been employed as a vacation relief driver, for those who were actually so employed were not senior to Petitioner; thus Petitioner was also entitled to be made whole for these losses in wages for the second period of June 18th to September 8th (throughout the proceedings it is proved that Petitioner sought, but unsuccessfully, employment in the field but had been blacklisted by the Teamsters. B. A., pp. 136-147, 150-164, esp. p. 136, by Teamsters' attorney: "On your last pint of blood will he [Petitioner] ever be able to work in the industry.").

This reasoning of the Examiner and Board, now further bolstered and proved by the evidence, was initially rejected by the Court in its first opinion of

February 15, 1954, as "too conjectural." But this portion of the initial opinion was amended, and the Court withdrew its rejection of the Board's remedy and reasoning and stated it would "suspend passing upon" this portion of the remedy and would remand for hearing on that issue. (See digest in B. A., p. 10, fn. 7.)

And the record discloses that it is exactly on this point that additional facts were adduced to support the inferences and the reasoning of the Examiner and the Board. Thus, ruled Examiner Buchanan after the remand, "The nature, the extent of that remedy remains to be determined. It may well be in any given situation we might find that there is in a practical sense, no possible remedy. That is what we are going to hear now. . . ." (B. A., p. 131). And the hearing disclosed that Petitioner had been in the industry for 33 years (B. A., p. 132), that route men took vacations during June-August (B. A., p. 135), that R. K.'s own President testified that a "swing man" with seniority would get a permanent route (B. A., pp. 179-180), but that in the past such an individual who had been previously employed as a swing man, but for 15 months thereafter was no longer employed by R. K., was then called in and given a permanent route (B. A., pp. 190, 192, 193-194, and esp. p. 78, fn. 22), and that Petitioner's seniority, experience, and capabilities as set up and disclosed in this record, should have given him the route which was (discriminatorily?) given to the said "swing" individual.

The reasoning of Examiner Buchanan very carefully followed the first opinion and remand of the Circuit

Court. At pp. 78-83 of the Board's Appendix herein the narrowing of the issue, the particular facts, and the inferences and reasoning are disclosed. Thus: "The procedure will thus be in accordance with the Court's decision and its indicated position. Were we to confine ourselves to 'establishment' of another route, we would be weighing what the Court declared would be too drastic a remedy. On the other hand, the modification and the remand indicate that consideration should be given to and determination made of Winzelberg's right to employment, *not by discharge of another employee on or after January 27, 1951, but by assignments in preference to another.* As we follow the seniority pattern recognized by the parties, R. K.'s employment records point to availability of a route for which Winzelberg could have bid. . . ." (B. A., pp. 79-80). (Emphasis added.) The Examiner's Supplemental Intermediate Report then examines the evidence from the point of view above set forth and concludes: "Others with less seniority than Winzelberg are now [April 11, 1955] employed as route salesmen. The job to which he has been entitled is thus a continuing one, and Winzelberg is still entitled to immediate instatement" (B. A., p. 82).

The Board agreed with this (*supra*, p. 21, B. A., p. 11, fn. 8, 2d par.) but the Circuit Court felt that on June 18th Petitioner "would have stood as a stranger to the respondent bakery, wholly without status as an employee. There was no evidence either of contract or of custom whereby for any subsequent period he would have been entitled to the status of an employee with the privileges of seniority which pertained to employees. On June 18, 1951 . . . and on

June 16, 1952 [discussed shortly], . . . he would have lacked status as an employee even if he had had temporary employment until March 10, 1951" (B. A., p. 302).

There is a simple anticipation (answer) to this argument, as well as to the later statement by the Court, "But a thorough reading of the record fails to disclose any evidence of a seniority system applicable to R. K.'s *ex*-employees [*sic*] whereby Winzelberg . . . would have been entitled to the permanent established route which then became available. And absent evidence of a seniority system enforceable by *ex*-employees [*sic*], whether Winzelberg . . . would have been subsequently employed by R. K., still remains a matter only of conjecture" (B. A., p. 303).

The answer is given by both the Trial Examiner and the Board. The former's Supplemental Intermediate Report, B. A., pp. 72-73, anticipates the Court, for there R. K.'s argument, "strenuously and repeatedly asserted," is considered. That argument is "that valid and reasonable limitations would effectively have prevented Winzelberg's employment by R. K." The answer is: "If custom or practice in the industry offered a defense to Winzelberg's claim to a job, it was properly to be raised at the earlier hearing as a sufficient defense to the allegation of discrimination. It cannot be held that he was discriminated against by the failure or refusal to put him to work and at the same time that established practice justified such failure or refusal. But the first of these propositions has already been found [and con-

curred in by the Court of Appeals]; the second must therefore fall." The Labor Board likewise anticipates the Court's second opinion when it refers to Petitioner's abiiity "to fill in for vacationing route salesmen and to perform the duties of a permanent route salesman. . . ." (B. A., p. 11, fn. 8). But the Board does two things: first, it rejects the Examiner's "statement that the law of the case precluded Respondents from relying" upon their, Respondents', offers of employment to Petitioner, for these offers were of employment "less desirable than that unlawfully denied" Petitioner; second, the Board affirmatively "find, on the basis of the evidence credited by both" Trial Examiners, that "R. K. had a vacancy" originally because of a driver's illness, that "R. K.'s President told Winzelberg that he was qualified therefor," and that the person who later was employed on June 18th to fill in for vacationing drivers, "so far as the record shows did not have Winzelberg's experience . . ." and that Winzelberg was "at least as well qualified as Greenberg [hired to fill in] to fill the jobs held by Greenberg. . . ." (B. A., p. 11, fn. 8).

c) June 16, 1952-April 2, 1955 (the third period involved). Between September 8, 1951, and June 16, 1952, there was no need for a permanent, regular route man by R. K. On June 16, 1952, however, an opening developed. It was filled by the driver R. K. had hired on June 18, 1951, to fill in for vacationers, *i. e.*, the second period. This driver had not been employed in any capacity by R. K. during the above interim between the second and the third periods. He received the job on the basis of seniority. The two Trial Examiners, and the Board, reasoned that Petitioner, who should have been employed for the second period,

would likewise have received this third-period job, and on the basis of seniority again. The facts disclosed Petitioner as being available, qualified, and eager for the job, but he was not offered it or hired. Why was Greenberg, the vacationing fill-in for the second period, hired for this third period? The Circuit Court says that, "so far as the evidence shows, [it] was due only to the fortuitous circumstance that he was available and qualified—not because of any rights of seniority entitling him to the job. Since the appointment was not sought by a present employee, the respondent employer was entitled to fill the position by anyone it chose—whether theretofore employed or not. . . ." (B. A., p. 302).

The Court paraphrases the Board's reasoning as follows: the Board says that the record now, as distinguished from the original one, "contains concrete evidence as to the incidence of turnover among R. K.'s route salesmen, and as to R. K.'s seniority practices, so that these factors bearing on Winzelberg's opportunities for advancement to a route salesman's job, absent discrimination are no longer matters of conjecture" (B. A., p. 303, and see, *supra*, p. 20). But, said the Circuit Court, "a thorough reading of the record fails to disclose any evidence of a seniority system applicable to R. K.'s *ex*-employees [*sic*]. . . ." (B. A., p. 303, see also, *supra*, p. 24).

The Court of Appeals overlooked the following pertinent and very material evidence:

1) R. K., by its President, wrote Petitioner a letter dated January 27, 1951 (B. A., pp. 121-122). The Trial Examiner asked R. K.'s attorney whether he,

the attorney, agreed with the Examiner's interpretation of the letter that it "offers Mr. Winzelberg a job as a replacement of a driver who was not going to be working for two or three months, after which Mr. Winzelberg would be used as a vacation relief man and then, after that, according to the letter, the Respondent R. K. Baking Corporation, 'would be glad to establish another route for you as I feel you are just the right man for us.' . . . That is your interpretation? Mr. Smith [attorney for R. K.]: Yes. Mr. Greenhoots [the sick driver to be replaced] . . . was out six weeks. Before the vacations would actually begin, and after the return of Mr. Greenhoots, that was a period of . . . Two months. . . . We wouldn't be able to use him" (B. A., p. 119).

2) On the remand, and during the hearing before the Trial Examiner, counsel for R. K. and the Union, as well as for the Board's General Counsel, argued the scope of the remand (B. A., pp. 125-131), and this very question of evidence to prove that Petitioner was entitled to instatement was discussed hotly. The Board's counsel agreed that "the mere fact that the man is discriminated against does not automatically entitle him to reinstatement and back pay" (B. A., p. 129). The Trial Examiner concluded the discussion with, "The nature, the extent of that remedy remains to be determined. It may well be in any given situation we might find that there is in a practical sense, no practicable remedy. That is what we are going to hear now. . . ." (B. A., p. 131).

3) On remand, R. K.'s President testified that Greenberg (who took over for the ill driver in place of Petitioner herein) "came in as a temporary replacement to replace someone who was sick on two or

three occasions where you worked a few weeks each time, and then was severed from our payroll for a very long period of time" (B. A., p. 189). R. K.'s President also testified that the procedure and custom for a driver to acquire a permanent route is "He first has to serve as a swingman or as a relief man, and he serves as such until such a time as one of the regular men either loses employment, resigns, or passes away. In that case the route is usually put up for bid and anyone of the employees that has seniority, they have a right to get that route instead of the route that they are on at the present time" (B. A., pp. 179-180). Greenberg began working for R. K. as a temporary relief man on February 7, 1951, for a driver who was ill, continued till February 17th, and on that day took over the route of the sick driver (whose position the Trial Examiner, the Board, and the Circuit Court all agree Petitioner was to get for the period of this illness). Greenberg worked till March 10, 1951, when the sick driver returned (B. A., p. 190). Thus the first period involved here, from February 7th to March 10, 1951, for which the Court of Appeals agreed Petitioner was entitled to instatement and back pay, was covered mainly by Greenberg, whose only work record for R. K. at that time was between February 7th and February 17th, when he took over as a relief for the sick driver. Greenberg's work was thus exactly what Petitioner's would have been herein, namely, a relief man for a sick driver. R. K.'s President testified, as above, that to get a permanent route a driver has to be employed first "as a swingman or as a relief driver." Admittedly, Petitioner was to be instated to the job Greenberg was given. Thus, as everyone agrees, Petitioner's

experience was as a relief driver, and at least equalled Greenberg's (but we must add Petitioner's 33 years in the industry). Between March 10, 1951, when "Greenberg was severed from employment at R. K." (B. A., p. 186), and the second period of June 18, 1951, to September 8, 1951, Greenberg admittedly did not work for R. K.; after September 8, 1951, to June 16, 1952 (the beginning of the third period), Greenberg again admittedly did not work for R. K.; on June 16, 1952, however, Greenberg, who was not then employed by R. K., was employed by them to take over for a driver who had bid in another (deceased) driver's route, thus leaving his own route open (B. A., p. 190). The following excerpt from the testimony is self-explanatory at this point:

> "Q. (By Mr. Kimmel) [Board's attorney, cross-examining R. K.'s President] When Greenberg came back to your employ, he took over a route; is that correct? A. That is so.
>
> Q. Didn't you testify before that it was the practice in your company, and indeed in the industry, that men were not taken from the outside and given routes but that, rather, swingmen then in your employ were given routes, or were given the first chance to bid on an open route; did you so testify? A. Yes, that is precisely what we did. We followed that pattern. This man had previously been employed by us. He knew our produces and he knew our methods.
>
> * * * *
>
> Q. Greenberg was not in your employ at the time that Schirloff vacated this route; is that correct? A. That is correct.

Q. Can you explain why Greenberg, who was not then in your employ, received that route rather than one of the swingmen who had bid in for the route? A. Yes. As you will recall, I testified that this here thing took place just immediately after the death of Kantor, and then we had a strike almost immediately after that and the plant was shut for two weeks. I believe we had no other swingmen available, to begin with, and secondly, nobody wanted this route because this was the poorest earning route in the company, and nobody wanted to make a sacrifice to take that. We then had to go out and get a person best qualified for the job. Greenberg was the man best qualified for it. He knew our line. We have to break in a swingman and it takes a minimum of two weeks at company cost, so that the man could be acquainted with the identification numbers of our products. We don't indicate on our boxes of cake as to what the box contains. . . ." (B. A., pp. 129-193).

4) R. K.'s President testified, as quoted above, that before a driver could bid in on a permanent route he had to serve first "as a swingman or as a relief man." The relative importance, or, rather, unimportance he attached to these positions, insofar as serving in either was a condition precedent to the bidding, is illustrated by his testimony that certain drivers who later took over permanent routes, "In some places you will see that they were vacation men, and then, maybe after the vacation period was over, they may have served a week or two weeks or three weeks as swingmen;

until we readjusted the schedule again" (B. A., pp. 195-196). Now, as to the application of seniority at this point, the same President testified that seniority controlled in getting a permanent route (quoted above at p. 28, B. A., p. 179).

5) And, on the question now of whether seniority was adhered to by R. K., its same President agreed that of the eleven regular routemen then (February 9, 1955) employed, one was still Greenberg, and one, whose name the President could not remember, did not "move from the ranks," but was "hired as a regular routeman," that he was "hired . . . from the outside. . . ." (B. A., p. 196).

Third: The conclusions of the Court of Appeals, based upon its (mis-)understanding and (mis-)application of the facts and the law, now were that [1] "at least in the setting of this case the unfair labor practice found to have occurred on January 27, 1951 has not been shown to be the proximate cause of failure to appoint Winzelberg to jobs which were not open until long after his temporary employment and his status as an employee had terminated . . . [2] The record discloses substantially the same defect of proof with respect to the Board's order of instatement. Merely because Winzelberg would have had, but for the unfair labor practice proved, six weeks of temporary employment, it does not follow that for fifteen months thereafter he had status as an employee or that he had rights of seniority entitling him to subsequent appointment to a permanent and lucrative position. . . ." (B. A., p. 303).

The short answer is: that R. K.'s President testified differently as to [1] above, and this has already

been sufficiently treated as to testimony, reasoning, and law not to require further discussion; that again R. K.'s President has testified differently as to [2] above, and again this has likewise been sufficiently treated to demonstrate the error of the Circuit Court.

C. Conclusions

The record discloses a man, with 33 years in an industry, black-listed by a Teamsters Local and losing the opportunity for a job because of an illegal union-security clause. This is conceded to be an unfair labor practice. The only question is how to effectuate the remedial purposes of the Act and to make this man, unable to get a decent job in the field, whole. The Petitioner is today, relegated to an inferior job, out of his field; for 9 years now he has sought redress; two Trial Examiners and seven Board Members agree on a remedy which has a solid basis in the testimony, and has not alone substantial evidence to support it, but reason and logic and justice. Three Judges below initially disagreed and, as we have seen, one of these plus two others unfortunately misinterpret and disregard the new facts and the changed law, and use illogical and invalid reasoning.

What the testimony discloses, that the Teamsters will spill pints of blood in this case to prevent Petitioner from getting a job in the industry, is being accomplished through judicial misinterpretation and error.

It is respectfully submitted that equity and justice, besides facts, law, logic, and reason, cry aloud for this petition to be granted.

The writ should run with respect to the three questions presented.

Respectfully submitted,

MORRIS D. FORKOSCH
375 Pearl Street
Brooklyn 1, N. Y.
Counsel for Petitioner

Dated: Brooklyn, N. Y.
April 22, 1960

APPENDIX

Excerpt from Opinions

This appendix contains the first opinion of the Court of Appeals for the Second Circuit in this matter. The opinion is entitled "National Labor Relations Board v. Gottfried Baking Co., Inc., et al." and is found in 210 F. 2d 772, dated February 15, 1954, and modified on a petition for rehearing dated May 15, 1954.

The Court's opinion is a lengthy one which takes up and decides questions extraneous to the questions involved in this petition for certiorari. These extraneous questions relate to the jurisdiction of the Board because R. K. is alleged not to be engaged in interstate commerce, whether the preferential hiring clauses in the contracts were illegal, whether a "saving clause" took them out of this area of illegality, whether the Gottfried contract was terminated before the discrimination involved herein occurred, whether the six-months short statute of limitations for charges is applicable herein, and the discrimination itself.

The only matter material and pertinent to this petition for a writ of certiorari is found in the last two paragraphs of the opinion, which paragraphs follow in full:

> Affirmatively, the Board ordered R. K. to offer Winzelberg immediate employment as route salesman, and ordered the Union to withdraw its objection to Winzelberg's employment by R. K., to so notify R. K. in writing, and to notify Winzelberg in writing that such withdrawal has been effected. The Board's order further required

that R. K. and the Union jointly and severally make Winzelberg whole for the loss of earnings incurred by the discrimination against him.

On Petition for Rehearing

MEDINA, *Circuit Judge.*

We shall suspend passing upon that part of the order described in the preceding paragraph and remand the case to the Board for the purpose of hearing and determining the matter of the respondents' specific obligatitons under the "reinstatement" and back pay provisions of its order. In all other respects, the Board's order will be enforced.

Decree Enforcing in Part and Denying in Part an Order of the National Labor Relations Board

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

R. K. BAKING CORPORATION, AND BAKERY AND PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

Before: CLARK, HINCKS and WATERMAN, *Circuit Judges.*

This Court of September 10, 1954, entered its decree enforcing the Board's order of March 3, 1953 against these respondents, except as to the reinstatement and reimbursement provisions of the order which were remanded to the Board for the purpose of hearing and determination of the specific obligation of Respondents R. K. Baking Corporation (hereinafter called R K) and Bakery and Pastry Drivers and Helpers Union, Local No. 802, IBTCWHA (hereinafter called the Union) under that portion of the Board's said order which requires R K to offer Max Winzelberg immediate employment as route salesman, and requires that Respondents R K and the Union jointly and severally make Winzelberg whole for the

Decree Enforcing in Part and Denying in Part an Order of the National Labor Relations Board

loss of earnings incurred because of the discrimination practiced against him. The Board having on March 20, 1959, petitioned this Court for enforcement of its supplemental order of May 6, 1958, as modified after proceeding pursuant to that remand, and the Court having heard argument of respective counsel on November 6, 1959 and being fully advised in the premises, on December 24, 1959, handed down its opinion enforcing in part and denying in part the supplemental order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Second Circuit that the Respondent R K Baking Corporation and the Respondent Bakery & Pastry Drivers and Helpers Union, Local No. 802, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and their respective officers, agents, successors, and assigns, shall jointly and severally make Max Winzelberg whole for the loss of earnings he has suffered because of the discrimination against him, which loss of earnings amounts to $696.36. If possible, one-half of such back pay shall be paid by Respondent Union.

CHARLES E. CLARK
Judge, United States Court of
Appeals for the Second Circuit

Filed: January 27, 1960

CARROLL C. HINCKS
Judge, United States Court of
Appeals for the Second Circuit